



OFFICE OF ADMINISTRATIVE HEARINGS  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
STATE OF HAWAII

In the Matter of

STUDENT, by and through Student's  
Parent,

Petitioners,

vs.

DEPARTMENT OF EDUCATION,  
STATE OF HAWAII,

Respondent.

DOE-SY0708-067

FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND DECISION

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND DECISION**

**I. CHRONOLOGY OF CASE**

On or about November 8, 2007, Irene E. Vasey, Esq., filed a request for an impartial hearing on behalf of Student and Parent, collectively referred to as "Petitioners".

The request was duly transmitted by the Department of Education, State of Hawai'i ("Respondent" or "DOE") to the Office of Administrative Hearings, Department of Commerce and Consumer Affairs.

A resolution session was held in the above-captioned matter on November 21, 2007. The parties were unable to reach a resolution in this matter.

On December 14 and 28, 2007, the pre-hearing conference in the above-captioned matter was conducted by the undersigned Hearings Officer. Petitioners were represented by Ms. Vasey. Respondent was represented by Aaron H. Schulaner, Esq. and George S.S. Hom, Esq. The hearing was scheduled to convene on January 22, 28, and 29, 2008. Based upon good cause, the Hearings Officer granted the parties' request to extend the forty-five day period specified by Hawai'i Administrative Rules ("HAR") §8-56-77(a), from January 22, 2008 to March 11, 2008.

On January 14, 2008, Respondent, by and through Mr. Schulaner, filed Respondent's Motion to Dismiss or in the Alternative for Summary Judgment. On January 15, 2008, Petitioners, by and through Ms. Vasey, filed Petitioners' Motion to Strike Respondent's Motion to Dismiss or in the Alternative for Summary Judgment.

On January 18, 2008, a hearing was convened on Respondent's motion. Respondent was represented by Mr. Schulaner. Petitioners were represented by Ms. Vasey. The Hearings Officer heard the parties' arguments and took the matter under advisement. Later that day, the Hearings Officer issued an order denying Respondent's motion.

On January 22, 2008, the hearing in the above-captioned matter was convened by the undersigned Hearings Officer. Parent was present and represented by Ms. Vasey. Respondent was represented by Mr. Schulaner. The DRT was also present on Respondent's behalf.

The hearing was reconvened on January 28 and 29, 2008. Parent was present and represented by Ms. Vasey. Respondent was represented by Mr. Schulaner. The DRT was also present. The parties agreed to submit written closing briefs on or before February 25, 2008.

## **II. ISSUE**

1. Whether Student should have been evaluated and/or found eligible for special education and related services under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA").

## **III. FINDINGS OF FACT**

1. Student is \_\_\_\_\_ years old. Student is presently in the 7<sup>th</sup> grade and being home schooled by Parent. During 2004-2006, Student was in the 4<sup>th</sup> and 5<sup>th</sup> grades, and attended the Elementary School. During 2006-2007, Student was in the 6<sup>th</sup> grade, and attended the Home School. The Elementary School and the Home School are public schools.

2. Student is \_\_\_\_\_. Student lives with Parent, Student's \_\_\_\_\_, \_\_\_\_\_.

3. Parent testified that Student reads very, very slowly and uses Student's finger to point at each letter. Student also mispronounces a lot of words. Student had problems solving math word problems and numerical operations and did not know Student's multiplication facts.

4. Student's Quarter and Status Report included the following comments from Student's 5<sup>th</sup> Grade Teacher:

a. 1<sup>st</sup> quarter – Student is a joy to have in class. Student works hard and always tries Student's best. Student is expected to meet the 5<sup>th</sup> grade standards in science and social studies if Student's present level of acceptable performance continues. Student is expected to meet the 5<sup>th</sup> grade standards in reading, writing, and math, if Student's present level of performance improves. Student should work on developing better comprehension skills. It would help to speed up Student's improvement if you would review Student's weekly reading comprehension work before Student brings it back to school. Please encourage Student to read daily;

b. 2<sup>nd</sup> quarter – Parent/teacher conference. No comments from teacher;

c. 3<sup>rd</sup> quarter – Student's overall approach and achievements in reading and life science this quarter were excellent. Student stayed focused during class and consistently strove to do Student's very best. In math, Student continues to have a difficult time grasping new math concepts. Student needs help with multiplication facts. Continued daily practice will help Student to accurately learn multiplication. Student's behavior in class is always exemplary. Student is a delight to have in class. Student continues to demonstrate Student's ability to be responsible for Student's own learning. Please encourage Student to never give up and always do Student's best; and

d. 4<sup>th</sup> quarter – Student is always polite and cooperative. Student has continued to improve in Student's reading comprehension this year. Student was also able to improve in Student's writing skills. Continue to have Student read and write daily. Although Student tries Student's best, all the basic 5<sup>th</sup> grade math skills are very difficult for Student. Please help Student practice Student's math facts during the break. It has been a pleasure having Student in my class this year. Student was a great student and had a great sense of humor.

5. Student's written comments during the 2<sup>nd</sup> quarter of 5<sup>th</sup> grade were: "I think I am bad in Math, & Social Studies because I can't keep up with all the questions & numbers & what to learn & I think we should slow down on the math. And on the Social Studies I don't know what is colonial day & why we have to where the white thing/hat on our head". At the end of the 3<sup>rd</sup> quarter, Student thought Student could do better and wanted to improve Student's math.

6. Parent's written comments during the 2<sup>nd</sup> quarter of 5<sup>th</sup> grade were: "I am very concerned with Student's math & reading scores. I don't understand why we test on something a child hasn't learned and then say the scores are too low. Student needs help quickly in these areas and I am worried about Student entering 6<sup>th</sup> grade with no knowledge." At the end of 3<sup>rd</sup> quarter, Parent was proud of Student working as hard as Student did, but wanted to see Student progress in math and improve Student's spelling.

7. According to Parent, Student had many difficulties at the Home School. Student experienced a lot of anxiety because Student's peers bullied Student, and this affected Student's self-esteem. Student did not have any friends at school. Student usually stayed in the classroom to help the teacher and to receive assistance with Student's school work and homework.

8. Parent stated that when he/she helped Student with homework, Student was clueless. Student could not explain to Parent what Student needed to do to complete the assignment. Math was like a foreign language to Student. Student didn't have basic math foundational skills and sometimes could not start the math homework. Parent and Student did homework for hours and hours, and Student cried, because Student was frustrated and could not figure out how to do the work. Student is a very positive person and a very, very hard worker.

9. On September 8, 2006, the 1<sup>st</sup> quarter of 6<sup>th</sup> grade ended. Student received the following grades: a) Science – "C"; b) Social Studies – "A"; c) Physical Education – "A"; d) Reading Workshop – "B"; e) Math – "B"; f) English – "C"; and g) Advisory – "S".

10. On October 25, 2006, Parent submitted a request for evaluation to the Home School. Parent's concerns were that Student was assessed at the 2<sup>nd</sup> grade level for math and reading in Student's private tutoring lessons. Student also complained that Student could not read the board in the classroom.

11. On October 30, 2006, the 6<sup>th</sup> Grade Science Teacher completed a Student Status Report Secondary ("SSRS") for Student. The SSRS included the teacher's primary concern for the student, the student's ability (teacher's impression of youngster's potential), academic information (including functioning level/acquired skills, strengths and weaknesses, etc.), learning style (optimal condition for Student's learning), classroom behavior (how the student attends to various classroom activities), communication (initiating conversation and conversing with teachers and peers, able to follow simple directions, and confide his or her feelings), relationships (adult and peer relationships before/after school), and attendance.

The 6<sup>th</sup> Grade Science Teacher's primary concern for Student was that Student made minor mistakes in Student's work at times. Student was capable in class when given enough time and when Student was on task. Student was also focused, had a good work ethic, and was comfortable talking to peers and teachers. Student's relationships with peers and adults seemed fine. Student learned best when Student was taught with hands-on and visual techniques. Student was currently receiving a "C" in science.

12. The 6<sup>th</sup> Grade Math Teacher also completed an SSRS for Student. The 6<sup>th</sup> Grade Math Teacher's primary concern for Student was academic progress. Student was able to complete grade level assignments with help, and needed improvement in and more practice with basic skills. Student behaved well in class and had positive relationships with peers and teachers. Student was able to follow simple directions and initiate conversation with the teacher when few students were around; usually not during class time.

13. On November 1, 2006, a Student Support Team ("SST") meeting was scheduled for Student. Prior to Student's meeting, a meeting was scheduled for \_\_\_\_\_. There was insufficient time to conduct Student's SST meeting on that date, so it was continued to November 11, 2006.

14. On November 8, 2006, the 6<sup>th</sup> Grade Social Studies Teacher completed an SSRS for Student. The 6<sup>th</sup> Grade Social Studies Teacher's primary concern for Student was that Student had difficulty with reading comprehension. With regard to Student's ability and academic information, the teacher stated that Student relied a lot on verbal and visual cues to understand instructions, and was able to complete 70% of Student's assignments with help from Student's peers or an adult supervisor. Student consistently turned in assignments with 75-80% accuracy; however, Student relies on Student's peers to assist Student with reading and with answers on worksheets. When asked, Student was able to verbally describe Student's answers on a worksheet or an assignment. Student learned best in heterogeneous groups with opportunities to converse with peers for tutoring. Student's long term assignments should be "chunked" or broken down into smaller, manageable pieces and Student should be given frequent progress checks. Student was positive, well behaved, and motivated to do well in school. Student was generally shy around adults and hesitant to ask questions. Student relied on peer guidance and assistance.

15. On November 11, 2006, the 6<sup>th</sup> Grade Reading Teacher completed an SSRS for Student. This teacher did not have a primary concern for Student. Student was reading at the 6<sup>th</sup> grade level in this class and was progressing well. Student worked well independently

and met all of his/her expected responsibilities in class. The structured learning environment in class worked well for Student. Student was attentive in class most of the time. Sometimes Student was observed to be in a “daydream-like” state, but this did not prevent Student from meeting the daily class requirements. Student was articulate and made Student’s needs known to the teacher. Student was respectful towards adults and peers. Student was also cooperative and worked to please Student’s teacher.

16. On November 14, 2006, an SST meeting was convened for Student. The purpose of the meeting was to discuss Parent’s request for an initial evaluation of Student. Parent received the procedural safeguards prior to the meeting.

The November 14, 2006 SST Meeting Information and Notes listed Parent’s concerns for Student as: a) reading and spelling skills; b) Student’s inability to understand math and reading; c) Student reversed the letters “b” and “d”, has problems with writing, and doesn’t know Student’s multiplication facts (in spite of Parent drilling Student with flashcards) for an extended period of time; d) Student was frustrated when doing Student’s homework; and e) it was difficult to get Student to read at home because reading was difficult for Student.

17. Student’s teachers shared the following information at the November 14, 2006 meeting: a) In English - Student was capable of doing quality work; had good penmanship; and consistently demonstrated the same difficulties with writing as a majority of students in the class did; b) In math - arrangements were made for Student to be tutored by the 6<sup>th</sup> Grade Math Teacher during after school hours; Student struggled to see what was written on the board; adjustments to the quantity of work Student receives could be made upon a discussion between Student and the teacher; and other accommodations were available to Student; and c) In science – the teacher rephrased concepts and context for Student; and Student would come in and ask the teacher for help.

18. The following recommendations were made at the November 14, 2006 SST meeting: a) Student would work at home for 5 minutes a day to learn Student’s multiplication facts; b) Parent should take Student to get a vision check or relate his/her concerns to the family physician; and c) an Action Plan would be developed to identify the supports, modifications, and accommodations to be put in place to assist Student in progressing in the general education curriculum. The Action Plan would be shared with Parent in a subsequent meeting in January 2007 to review the Action Plan.

19. Student's Action Plan, implemented on November 15, 2006, contained the following accommodations: a) preferential seating; b) Student may move up to the front of the classroom to copy things off of the board; c) step-by-step instruction; clear oral and visual directions; d) chunked assignments; e) the opportunity to redo assignments as needed; f) non-verbal cues to redirect Student's off-task behaviors; g) modified assignments and tests as agreed upon by Student and teachers; h) teachers available to Student at recess and after school by appointment; i) during morning visits with advisory teacher, teacher will prompt Student to work on missing assignments to seek assistance from other teachers; and j) practice multiplication tables at home.

20. Parent also testified that the SPED Teacher was very rude, hostile, and disrespectful to him/her during the November 14, 2006 SST meeting. Parent brought a binder of Student's educational information (grades, progress reports, homework, etc.) to the meeting. During Parent's presentation of his/her concerns for Student's education, the SPED Teacher was rolling her eyes and later stated that she was the expert in special education. The SPED Teacher had not previously met Student.

21. Parent asked the SST what was the harm in having Student tested and why should Student continue to struggle and fail. Pursuant to the SST meeting, Parent worked with Student between 45-60 minutes per day on Student's multiplication facts with flash cards. Student's vision was evaluated and it was determined that Student needed glasses for homework and close up reading. Parent agreed with the accommodations listed in the Student Action Plan and after school help for math class.

22. The November 15, 2006 Prior Written Notice ("PWN") for the November 14, 2006 SST meeting stated that an initial evaluation for possible special education eligibility would not be conducted at this time. Student was currently progressing in Student's general curriculum program and maintaining satisfactory grades in all subject areas. Student was able to benefit from and progress in Student's educational program through classroom supports and accommodations and assistance from Student's teachers. The SST considered the possibility of conducting additional assessments as part of an initial evaluation for special education eligibility, however, it determined that based on the current data, there was no evidence to pursue consideration for special education and related services. An Action Plan will be developed and implemented within Student's general education curriculum. The Action Plan would address the classroom accommodations and student supports to be provided to Student. The plan would be shared with Parent and a follow-up meeting would

be scheduled in January 2007 to review the impact of the Action Plan on Student's performance and progress in the general education curriculum.

23. The SST considered the following information in reaching its determination not to evaluate Student – information and concerns shared by Parent, Hawai'i State Assessment scores, report card grades, SSRS, and information shared by teachers.

24. Parent was devastated when Student received the November 15, 2006 PWN. Parent spoke to the SSC and asked whether there was something else Student could do. The SSC told Parent that the only way Student could be evaluated was if Student went to a doctor and got a doctor's note saying that Student should be evaluated.

25. On November 20, 2006, Student's Pediatrician conducted a New Patient Dyslexia Evaluation ("NPDE") of Student. The evaluation included information about Student's health and information from Parent about Student's educational needs. Student's Pediatrician testified that the NPDE was a general screening tool and not a diagnosis of a learning disability. The NPDE indicated that further assessments were needed to determine if Student had a learning disability. Student's Pediatrician testified that she was not qualified to diagnose learning disorders.

26. By letter dated November 22, 2006, Parent faxed the SSC a note from Student's Pediatrician, requesting that Student receive psycho-educational and IQ testing due to school failure.

27. On November 27, 2006, Parent made a second request for an initial evaluation; psycho-educational and IQ testing for Student.

28. By letter dated December 4, 2006, the SSC informed Parent that the Home School received the note from Student's Pediatrician requesting psycho-educational and IQ testing of Student. Student's Pediatrician was invited to participate in the next SST meeting for Student, scheduled for December 15, 2006, to discuss her concerns with Student's educational progress

29. On December 5, 2006, the 2<sup>nd</sup> quarter of 6<sup>th</sup> grade ended. Student received the following 2<sup>nd</sup> quarter and 1<sup>st</sup> semester grades: a) Science – "B" and "C"; b) Social Studies – "B" and "A"; c) Physical Education – "A" (no semester grade); d) Reading Workshop – "B" and "B"; e) Math – "C" and "C"; f) English – "B" and "C"; and g) Advisory – "S" and "S".

30. On December 7, and 8, 2006, Student's social studies, science, and math teachers provided Grade Status sheets for Student. The Grade Status sheet is a list of Student's class work and homework assignments, quizzes, tests, and projects. The sheets

included the possible number of points Student could earn in each of these categories, the number of points Student actually received in these categories, as well as Student's grades for tests, homework, class work, quizzes, and projects. The period covered by the Grade Status sheets was from October 3, 2006 to November 21, to 27, 2006 (2<sup>nd</sup> quarter).

31. According to the Grade Status sheets: a) In social studies – Student received 15/37 points for tests (“F”), 72.5/82 points for homework (“B+”), 116/129 points for class work (“B+”), 16/22 points for quizzes (“C-”), and 144/159 points for quizzes (“A-); b) In science – Student received 64/83 points for tests (“B”) and 64/80 points for homework and class work (“B”); and c) In math – 31/40 points for class work/homework and 8/22 points for assessments. The math Grade Status sheets did not list grades for Student.

32. By letter dated December 11, 2006 to Student's Pediatrician, the SSC requested any additional data that related to the request for psycho-educational and IQ testing for Student

33. A second SST meeting was convened for Student on December 15, 2006. The purpose of the meeting was to discuss Parent's second request for an initial evaluation of Student. Parent participated in the meeting via telephone. Parent received the procedural safeguards prior to the meeting.

34. According to the December 15, 2006 SST Meeting Information and Notes, the purpose of the meeting was to discuss Student Pediatrician's request for evaluation. Student's grades from the 1<sup>st</sup> quarter, 2<sup>nd</sup> quarter, and 1<sup>st</sup> semester were reviewed. Student's Pediatrician was not able to participate in the meeting, but had spoken to the SSC, and faxed over some information about Student. The SSC had shared the following information with Student's Pediatrician: a) Student's current grades; b) that a previous SST meeting had been held and an initial evaluation was not conducted because Student was maintaining satisfactory grades and per Student's teachers, was progressing in school with classroom and teacher support; and c) that testing was prompted when there was concern about educational progress as related to a student's non-performance or difficulties in a subject area.

Parent felt that the SST was going over the same things that were discussed at the last SST meeting, and because Student's Pediatrician made a request to have Student tested, the evaluation should be done.

35. Parent participated in the December 15, 2006 SST meeting via telephone. Student testified that the SSC was very rude to him/her during the meeting. The SSC also denied that she had told Parent that Parent needed to get a doctor's note to get Student

evaluated. At the meeting, Parent mentioned that Student did not meet proficiency in the Hawai'i State Assessment<sup>1</sup> in math and reading for grades 3, 4, and 5. Also, in Student's after school private tutoring, Student had been assessed at the 2<sup>nd</sup> grade level for reading and math. Parent was informed that the SST would not take the private tutoring assessments into consideration because the tutoring service was a private business whose goal was to make money. Parent asked what else he/she could do to help his/her child and was told "nothing".

36. The December 15, 2006 PWN stated that an initial evaluation for possible special education eligibility would not be conducted at this time. A review of Student's current grades from the 2<sup>nd</sup> quarter indicated that Student maintained satisfactory grades in Student's classes, continued to benefit from Student's general education program, made progress in class through provisions of classroom supports/accommodations, and teacher assistance during, before school and after school hours.

37. The SST considered the following information in reaching its determination not to evaluate Student – Student's Pediatrician's notes and information, input and information shared by parent and teachers, and Student's progress report grades.

38. The 6<sup>th</sup> Grade Math Teacher testified that Student did fairly well in Student's class and earned "B" and "C" grades throughout the year. In 6<sup>th</sup> grade math, the Hawai'i Content and Performance Standards ("HCPS")<sup>2</sup> guide the curriculum. The focus in class was on higher level math problems. Students may use calculators, under certain circumstances, for tests and assignments. Student used a calculator during testing, when the need arose, and did not use a calculator for every assignment. Student's grades showed how Student was performing on the mandatory benchmarks required by the HCPS. "B" and "C" grades were above the average grades received in Student's class. Student could satisfactorily solve single digit multiplication problems when speed was not an issue and could complete double digit multiplication problems with the use of a calculator. The 6<sup>th</sup> Grade Math Teacher did

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<sup>1</sup> The Hawai'i State Assessment is a yearly testing program that measures student progress in meeting Hawai'i's reading, writing, and mathematics standards or expectations. The tests ensure that families and teachers know whether each student has learned the reading, writing, math, and science skills and information expected at each grade. The tests can help identify areas in which a student needs extra support and practice. Teachers and families can then work together to ensure that a student gets the help he or Student needs. The tests also help identify whether students have gained a strong understanding of grade-level materials and may be ready to be challenged by more advanced concepts and activities. See, Petitioners' Exhibit "42".and Respondent's Exhibit "32".

<sup>2</sup>The HCPS are high academic standards that give students clear achievement goals and help guide instruction in the school. The standards reflect important ideas, concepts, and skills that students should know and be able to demonstrate.

not think that Student needed special education to access the general math curriculum or to make progress.

39. The 6<sup>th</sup> Grade Social Studies Teacher testified that Student did fairly well in Student's class. Student received "A" and "B" grades and exceeded some of the HCPS. Student's grades were based on the various benchmarks that students needed to accomplish in the 6<sup>th</sup> grade. According to the 6<sup>th</sup> Grade Social Studies Teacher, at the November 14, 2006 SST meeting, there was no reason to think that Student required special education to access the general curriculum. Student was in the average range in class and completed 80% of Student's assignments or better on Student's own or with peer assistance. Some possible indications that a student might need special education would be failing grades, social isolation and complete withdrawal from the classroom and its activities.

40. The 6<sup>th</sup> Grade Reading Teacher testified that Student did fairly well in her class. In this class, the 6<sup>th</sup> Grade Reading Teacher works with students who are fair readers – they can read, but need extra help in reading multi-syllable words. The Reading Workshop class bridges the gap between reading and the core subject areas. Information about the core classes were integrated into the Reading Workshop class.

The students in Reading Workshop work on three areas: a) reading fluency (the ability to read smoothly and fluently) – the year end goal is to have students read 150 words per minutes with 5 or fewer errors; b) story reading – reading assignments are "chunked" or broken down into smaller, manageable segments. Students discuss the reading, then complete workbook questions that test their comprehension; and c) reading non-fiction articles – students read articles that provide them with terminology found in the content/subject areas of their other core classes (math, science, social studies, and English).

41. The 6<sup>th</sup> Grade Reading Teacher testified that none of Student's teachers told her that they had concerns with Student's reading ability. The 6<sup>th</sup> Grade Reading Teacher stated that Student was very attentive during instruction. Sometimes, when the other students were speaking, Student daydreamed. Students in Reading Workshop were taught to make eye contact and look at a speaker. Sometimes, during class discussions, Student did not make eye contact with the other students who were speaking in class. The 6<sup>th</sup> Grade Reading Teacher would then draw Student into the discussion without any problems. Student joined the discussion promptly and always had good things to add. This did not happen often. Student was a nice and respectful person.

42. The DOE Clinical Psychologist testified that dyslexia is a medical disorder or condition and in and of itself, is not a sufficient basis for a child to receive special education and related services. The SST may authorize IQ or psycho-educational evaluation for a regular education student, if significant impairment was observed in the child, and the child, could not access the general education curriculum. One reason an SST might potentially decide not to conduct assessments for an initial evaluation is that there is a lack of firm data that the child has a problem.

43. On March 8, 2007, the 3<sup>rd</sup> quarter of 6<sup>th</sup> grade ended. The 4<sup>th</sup> quarter ended on May 30, 2007. Student received the following 3<sup>rd</sup> quarter, 4<sup>th</sup> quarter, and 2<sup>nd</sup> semester grades: a) science – “C”, “C”, and “C”; b) social studies – “B”, “B”, and “B”; c) health – “A”, “A”, and “A”; d) reading workshop – “B”, “B”, and “B”; e) math – “C”, “C”, and “C”; f) English – “B”, “B”, and “A”; and g) advisory – “S”, “S”, and “S”.

44. Student’s grades for the 2006-2007 school year were: a) science – “C”; b) social studies – “A”; c) reading workshop – “B”; d) math – “C”; e) English – “B”; and f) advisory – “S”.

45. Student was accepted at the Private School<sup>3</sup> for 7<sup>th</sup> grade in 2007-2008. The school recommended that Student attend summer school as a remedial measure. Student attended the Private School summer school. Student took two classes; math and English. According to Parent, Student did extremely poorly during summer school. Parent and Student worked on Student’s homework for 3-5 hours each night. This was very stressful for Student. Student wanted to know why Student couldn’t answer the questions or understand what Student read. Student failed every quiz and test; Student got a “D” for English and an “F” for math.

46. Student was not allowed to attend the Private School during the 2007-2008 school year. Initially, Parent was going to re-enroll Student at the Home School, but changed his/her mind. Parent took a leave of absence from his/her job and began home schooling Student in August 2007.

47. On September 14, 17, and 21, 2007, Student’s Psychologist conducted a neuropsychological evaluation of Student at Parent’s request. The purpose of the evaluation was to rule out Attention-Deficit Hyperactivity Disorder (“ADHD”) and to assess for

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<sup>3</sup> Student’s Secondary School Admission Test scores were lower than what the Private School usually required of its students. However, the Private School admitted Student based on Student’s talents as a whole, not just test scores.

neuropsychological problems that might contribute to other learning disorders. Student was evaluated in these areas: (a) intelligence; (b) attention and concentration; (c) academic achievement; (d) perceptual organization; (e) language; (f) learning and memory; (g) executive function; and (h) emotional. The results of the evaluation were:

a. Intelligence – Student’s full scale IQ score was 92 (average range). Student’s verbal comprehension, perceptual reasoning, and processing speed indices scores were all in the average range. Student’s working memory index score was in the low average range. Overall, data suggested that Student should be able to think, reason, and acquire academic skills as well as an average peer;

b. Attention and concentration – the data collected in this area was highly varied. Student was able to attend to simple visual tasks as well as an average same aged peer and to simple auditory tasks as well as a low-average same aged peer. The rest of Student’s scores were lower, in the borderline to deficient ranges;

c. Academic achievement – first, the data collected from the Woodcock Johnson – III Tests of Achievement, indicated that Student’s math skills were deficient in the areas of simple calculations and applied problems. When given a time extension, Student’s score in math fluency (the ability to solve simple arithmetic calculations rapidly) increased significantly. Student’s history of extraordinary difficulty in acquiring math skills and the data showed that Student required support, curriculum adjustments, and tutoring in math. The data, seen in conjunction with Student’s average cognitive abilities, provided a good basis for diagnosing a math disorder or dyscalculia.<sup>4</sup> Second, the data showed that Student’s reading scores varied from low average to average. This indicated that during silent reading, Student read slowly and did not fully understand what Student had read. Student’s reading score increased significantly when Student was provided with time extensions. Finally, the data showed that Student’s initial score for writing fluency fell in the superior range; as did Student’s time extended score.

Student was also assessed with the Gray Oral Reading Test – 4<sup>th</sup> edition (“GORT-4”). The GORT-4 showed that Student performed in the average range for reading skills involving rate, accuracy, fluency, and comprehension of material read. Student might be able to read and comprehend better when Student reads out loud. Student’s reading skills, according to the GORT-4, were largely consistent with Student’s cognitive abilities.

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<sup>4</sup> Dyscalculia is a difficulty in learning or comprehending mathematics.

Student's Psychologist noted that Student's rate of reading was at the bottom end of the average range and was marked with a slow rate and barely minimal accuracy. Further difficulties included substitutions, omissions, and difficulty blending sounds. Put together with Student's history of having significant difficulty learning to read, and Student's observed reading rate and accuracy, suggested the presence of a reading disorder;

d. Perceptual organization – Student's ability to organize and replicate visually based information is average, though Student performs strongest when material is presented visually with a hands-on approach;

e. Language – Student was better able to differentiate between similar phonemic sounds in a noisy environment. This is not logical, but is a pattern commonly seen in children with ADHD;

f. Learning and memory – Student's scores in this area were highly varied within and between scales. Student learned best overall when material was presented visually, rather than verbally. The high level of scatter or wide differences between Student's scores, strongly suggested the presence of an attention disturbance that appears to negatively impact Student's ability to listen to complex stores or to retain auditory detail;

g. Executive function – Student's scores in this area were varied, but fell in the average range; and

h. Emotional – Student has some sadness in mood, but not severe enough to be problematic. Student has a fear of school bullies and experiences \_\_\_\_\_ and \_\_\_\_\_ around Student's \_\_\_\_\_.

48. Student's Psychologist's Diagnostic Impression was:

Axis I: Reading Disorder, Dyslexia<sup>5</sup>  
Reading Disorder, Dyscalculia<sup>6</sup>  
Mathematics Disorder  
ADHD , combined type

Axis II: No diagnosis

Axis III: Pediatric Growth Hormone Deficiency

Axis IV: Academic difficulty

Axis V: GAF = 60

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<sup>5</sup>Dyslexia is a learning disability that manifests primarily as a difficulty with written language, particularly with reading and spelling. It is separate and distinct from reading difficulties that occur from other causes, such as a non-neurological vision or hearing deficiency or poor or inadequate reading instruction.

<sup>6</sup> This appears to be a typographical error and should read "Mathematics Disorder, Dyscalculia".

Recommendations included reading remediation and tutoring for reading and math, high teacher – low student ratio in the educational setting, provision of extended time, do not ask Student to read out loud, preferred seating, and the provision of multi-sensory learning, such as Orton-Gillingham, to provide Student with an array of exposure to the material.

#### **IV. CONCLUSIONS OF LAW**

According to Petitioners' November 8, 2007 request for impartial hearing, the issue is whether Student should have been evaluated and/or found eligible for special education and related services under the IDEA.

Petitioners assert that the DOE wrongly refused to evaluate Student for possible learning disabilities at two SST meetings. As a result, Student should have been, but was not identified as having a specific learning disability or dyslexia. Parent seeks reimbursement for Student's summer placement at the Private School and other related educational expenses.

Respondent argues that the SST determined that Student was not entitled to an initial evaluation or eligibility under the IDEA because Student did not qualify as a child with a disability and did not require special education and related services to access the general curriculum. According to the information provided by Student's regular education teachers, Student was making educational progress, received passing grades, and was able to access the general curriculum without specially designed instruction.

#### **Applicable law:**

Petitioners as the party seeking relief, must bear the burden of proving non-compliance with the IDEA at the administrative hearing. *Schaffer ex rel. Schaffer v. Weast*, 128 S. Ct. 528 (2005).

Special education means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. Child with a disability is defined as: (i) a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services. 20 U.S.C. §1401(3)(A) and (29).

The court in *Capistrano Unified School Dist. v. Wartenberg*, 59 F.3d 884, 899 (1995) opined that in order to receive services under the IDEA, a child must satisfy three requirements: (1) he must suffer from one or more categories of impairment under the

IDEA; (2) his impairment must adversely affect his/her educational performance, and (3) his qualified impairment must require special education and related services.

Discussion:

During the fall of Student's 6<sup>th</sup> grade year, Parent asked the Home School, twice, to conduct an initial evaluation of Student to see if Student qualified for special education and related services.

Parent was concerned because Student had difficulties with math, reading, and writing. Completing Student's homework was also a frustrating experience for Student, because Student did not always understand the assignment, Student had a difficult time reading, and Student lacked some basic skills. The SST considered information provided by Parent,<sup>7</sup> Student's Pediatrician, Student's current core teachers, Hawai'i State Assessment scores, grades, SSRS, and progress report grades and information.

According to Student's teachers, Student received grades of "A", "B", and "C". Student was a hard worker who was able to make educational progress and successfully access the general education curriculum through Student's own efforts, and with teacher and peer assistance. Parent shared his/her concerns about Student's educational needs, including research Student had done, to answer his/her own questions about Student's difficulties and believed that Student should be evaluated pursuant to the recommendation of Student's pediatrician. Student's Pediatrician's recommendation was based on Parent's input and a discussion with Student and did not include any information from the Home School or a review of Student's educational records.

Student struggled at home with Student's homework assignments and spent long hours completing the assignments. In class, Student was respectful, hardworking, and completed Student's class work and projects with peer and teacher assistance. None of Student's teachers believed that Student required specially designed instruction to access the general education curriculum and would not have recommended that Student receive special education services. At that time, Student was progressing in school, maintaining satisfactory grades ("A", "B", and "C") in all classes, and not showing significant academic or emotional impairment.

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<sup>7</sup> Parent's testimony regarding the deplorable actions of the SPED Teacher and the SSC at the SST meetings was uncontested. However, a preponderance of the evidence showed that Parent was able to provide the SST with relevant information about Student's educational difficulties during these meetings.

Almost a year later, Student was diagnosed with dyslexia, dyscalculia, and ADHD. The DOE Clinical Psychologist disagreed with the ADHD diagnosis based on the fact that Student did not exhibit typical ADHD behaviors. However, the diagnoses of dyslexia and dyscalculia were not contested. Even though Student was diagnosed with dyslexia, dyscalculia, and ADHD, there was insufficient evidence presented to show that Student required special education and/or related services to address Student's educational needs. The testing conducted by Student's Psychologist placed Student in the average range for intelligence, executive function, and reading achievement. Student achievement scores in math (simple calculations and applied problems) were deficient, however, when granted additional time, Student's scores in these areas increased significantly. Extended time was a classroom accommodation provided to Student at the Home School, when Student needed it. The testing completed by Student's Psychologist was not conclusive for learning disabilities.<sup>8</sup> A preponderance of the evidence did not show that Student's disabilities adversely affected Student's educational performance in the regular education classroom or that Student required special education and related services to access the general education curriculum. In *Ashli C. ex rel Sidney C. v. State of Hawai'i*, 2007 WL 247761 (2007), the court noted that:

Whether a student's disability "adversely affects" his "educational progress" refers to the student's ability to perform in the regular classroom designed for non-handicapped students. If a student is able to learn and perform in the regular classroom taking into account his particular learning style without specially designed instruction, the fact that his health impairment may have a minimal adverse effect does not render him eligible for special education services.

Here, Student was able to perform adequately in the regular education classroom in all of Student's subjects, as evidenced by the testimony of Student's teachers, Student's grades, and progress reports. Student's disabilities did not adversely affect Student's educational performance or Student's ability to access the general education curriculum.

Based on the foregoing, the Hearings Officer finds that the DOE was not required to conduct an evaluation of Student on November 14, 2006 or December 15, 2006.<sup>9</sup>

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<sup>8</sup> Student's Psychologist did not testify at the hearing. Student's testing information was gleaned from the evaluation report.

<sup>9</sup> During the hearing, Petitioners argued that "Child Find" applies in this case. Petitioners, however, did not raise this as an issue in their request for impartial hearing. Although "Child Find" is an ongoing obligation and duty of the DOE, Respondent had no notice of this matter as a possible issue for hearing. Based on the foregoing, the issue of "Child Find" will not be addressed in this matter.

**V. DECISION**

For the reasons stated above, the Hearings Officer finds and concludes by a preponderance of the evidence that the DOE was not required to conduct an evaluation of Student on November 14, 2006 and December 15, 2006, and was therefore, not required to find that Student was eligible for services under the IDEA.

Based on the foregoing, it is hereby ordered that:

- 1) Petitioners' November 8, 2007 request for impartial hearing shall be and is hereby dismissed.

**VI. RIGHT TO APPEAL**

The parties have the right to appeal to a court of competent jurisdiction within thirty (30) days of receipt of this Decision.

DATED: Honolulu, Hawai'i, March 11, 2008.

/s/HAUNANI H. ALM

HAUNANI H. ALM  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs